No. 20,358

United States Court of Appeals

For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED,

and

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Appellants,

vs.

DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District,

and

PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased.

Appellees.

APPELLANTS' REPLY BRIEF

HANNA & BROPHY,
444 Market Street,
San Francisco, California 94104.
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 20,358

United States Court of Appeals

For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED,

and

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Appellants,

vs.

DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District,

and

PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased,

Appellees.

APPELLANTS' REPLY BRIEF

In the last analysis, the question to be determined in this matter is one of jurisdiction. Does the federal deputy commissioner have the power to pass upon a claim already heard and fully determined, at the request of the claimants, by a state tribunal?

I.

IT IS THE POSITION OF APPELLANTS THAT THE DEPUTY COMMISSIONER DID NOT HAVE JURISDICTION TO TRY THIS CASE.

(1) The nature of jurisdiction.

Jurisdiction over a particular case is the power to hear and determine that case. *Spencer Creek Water Co. v. Vallejo,* 48 Cal. 70. Jurisdiction is fundamental and it is jurisdiction alone that gives a court the power to hear, determine and pronounce judgment on the issues before it. *In Re Cavitt,* 47 Cal. App. 2d 698.

The first question that must be determined by a court in any case before it is that of jurisdiction. *Cohen v. Barrett,* 5 Cal. 195; *Clary v. Hoagland,* 6 Cal. 685; *Dillon v. Dillon,* 45 Cal. App. 191; *Fitzpatrick v. Sonoma County,* 97 Cal. App. 588. In this connection, jurisdiction of the parties is as necessary as jurisdiction of the subject matter. *Inga v. Blum,* 134 Cal. App. 398.

(2) Jurisdiction is an issue which may be raised at any time or place.

Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86; *Unemployment Reserves Comm. v. St. Francis Homes Ass'n,* 58 Cal. App. 2d 71.

Jurisdiction may be raised at any stage of the proceedings. *Matson Navigation Co. v. U. S.,* 284 U. S. 352. In fact, it may be raised for the first time on appeal. *Mott v. Smith,* 16 Cal. 533; *San Diego Savings Bank v. Goodsell,* 137 Cal. 420; *Costa v. Banta,* 98 Cal. App. 2d 181.

Appellees contend that failure expressly to raise the issue of jurisdiction before the state tribunal constitutes a waiver of the right to raise it later. We think the law is well settled to the contrary. See *Mott v. Smith, supra,* and companion cases to the same effect heretofore cited.

Where a state court and a federal tribunal may each take jurisdiction of an action, the tribunal first acquiring jurisdiction holds it to the exclusion of the other until its duty is fully performed and its jurisdiction is exhausted. *In re Cohen,* 198 Cal. 221; *Conrad v. West,* 98 Cal. App. 2d 116. Dissatisfaction on the part of litigants with orders and decrees of the court of one jurisdiction should not prompt the courts of another jurisdiction to attempt any interference. *Schuster v. Sup. Ct.,* 98 Cal. App. 619.

In sum, jurisdiction is an issue which is present in every case, whether specially pleaded or not; failure to plead it in this case did not and could not constitute a waiver. The award by the state tribunal was necessarily based upon an implied finding that it had jurisdiction of the case.

II.

THE STATE COMMISSION DID HAVE POWER TO MAKE THE DECISION WHICH IT DID IN THIS CASE.

The fatal injury took place outside of California borders, but it is nevertheless well settled that California has extra-territorial jurisdiction, i.e., jurisdiction to determine the compensation claim of an em-

ployee injured outside the state but hired within its borders. *Quong Ham Wah Co. v. I.A.C.* (Ming), 184 Cal. 35, 11 A.L.R. 1190; *Alaska Packers Assn. v. I.A.C.,* 1 Cal. 2d 250, 294 U.S. 532. See 23 Cal. Law Review 449.

The decedent was a California resident, working out of California for a private organization, and hired by the latter within California borders. On the basis of these facts, a prima facie showing of jurisdiction had been made, and the California commission properly exercised its jurisdiction when asked to do so.

It is true that such a determination was requested by the claimants, and that no objection thereto was raised by the insurer. The appellees herein contend that the insurer's failure to raise a jurisdictional defense before the commission constitutes a waiver of the right to plead it later. This is indeed a novel contention and one which, it will be noted, is not supported by any citation of authority. As heretofore stated, jurisdiction is an issue that can be raised at any stage of the proceedings, and can never be waived. It is a limitation upon the court, rather than the parties.

By the mere fact of making its findings and award, the state commission exercised its jurisdiction. That determination became final, the award was fully paid, and the endeavor of the federal deputy commissioner to superimpose his authority in such a situation amounts to a collateral attack on the determination by the state tribunal. As we have pointed out in our opening brief (page 18, final paragraph), dictum in

the case of *Mike Hooks, Inc. v. Pena,* 313 F. 2d 696, strongly suggests that the court regarded the prior decision by the state workmen's compensation tribunal as a final determination so far as the employee and the carrier were concerned; however, the controversy was between the employee and his employer in the form of a Jones Act suit against the latter, and was not barred by the compensation award since the *employer* was not a real party to that proceeding.

Here the prior decision by the state tribunal involved a controversy between dependents of the employee and the carrier, this being the very situation in which, as the court intimated, the prior decision should be regarded as binding.

III.

WHILE JURISDICTION OF THE STATE TRIBUNAL CLEARLY APPEARS, THAT OF THE FEDERAL COMMISSION IS MOST QUESTIONABLE.

The learned brief of opposing counsel points to no precedent or previous case which holds that the federal deputy commissioner has ever taken jurisdiction in a case involving similar facts. Surely, with the Defense Bases Act in existence for a quarter of a century, there would have arisen a situation involving a similar controversy, with a resulting decision, to which counsel could point as support for the action of the deputy commissioner herein. We are satisfied, in view of counsel's special knowledge in this field, that

such a decision would be known to him and have been cited, had such there been.

Instead, it has been necessary for appellees' brief to contend, not without difficulty, that this is a claim which should come under the federal act; that it is, in effect, a case of first impression and must be decided purely on its own facts, rather than upon the basis of precedent and familiar principles of law.

We have pointed out in our original brief the fact that it is well settled, under the "Death On The High Seas Act", that "vessel" is a term which includes an airplane. In that statute (46 U.S.C.A. 761), a cause of action is provided for wrongful death against the responsible "vessel, person or corporation". The courts have had no difficulty in determining that an airship is a "vessel", whether it is amphibious or not. *Sierra v. Pan-American World Airways, Inc.,* 107 F. Supp. 519; *Lacey v. Wiggins Airways, Inc.,* 95 F. Supp. 916; *Wyman v. Pan-American World Airways, Inc.,* 43 N.Y.S. 2d 420.

Query: If a flying ship, be it a Constellation or otherwise, is a "vessel" for the purposes of the "Death On The High Seas Act", why is it not a vessel for purposes of the Defense Bases Act and of the Longshoremen's and Harbor Workers' Compensation Act? It is significant that the brief of appellees makes no effort to meet this contention; indeed, it cannot do so, for the point seems well settled. Two of the three cases cited represented decisions of federal courts.

The fact that this particular defense has never been been raised before has been cited by opposing counsel (page 19, lines 1-3). If this is a contention to be given consideration, then we submit that it is fully offset by the equally interesting fact that never before, so far as the opposing brief discloses, has there ever been a precedent for the action taken in this matter by the deputy commissioner. In other words, never has an award been made under the Defense Bases Act in a case involving such a factual situation as we have here. Yet there must have been scores of injuries and deaths involving substantially similar facts.

IV.

THE LACK OF JURISDICTION BY THE DEPUTY COMMISSIONER IS SUPPORTED BY THE LATEST FEDERAL DECISION COVERING THIS SUBJECT.

We have reference to the case of *Texas Employers Insurance Association v. Calbeck,* decided on January 10, 1966 by the United States District Court for the Eastern District of Texas, Beaumont Division. The facts of this case, of which we were made aware through the courtesy of opposing counsel, are as follows:

An award of benefits was made by the Texas Industrial Accident Board for an injury sustained when an employee fell from a vessel under construction into navigable waters. The award was, in effect, affirmed on appeal to the state court of Jefferson County.

Thereafter, the employee filed a claim with the federal deputy commissioner for the same injury and was granted a more extensive award of benefits.

The employer and insurance company filed their petition for injunctive relief and summary judgment on the following grounds:

(1) That the acceptance by the claimant of a state court judgment operated as an "election" so as to preclude recovery under maritime law; and

(2) That judgment in the state court cannot be disurbed or collaterally attacked by an employee through seeking a federal remedy provided by the Longshoremen's Compensation Act, the state judgment being res judicata.

The claimant and the deputy commissioner took the position that there is really no conflict between the state and federal remedies; that the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, is exclusive and supreme, and that the employee did not lose his right to have his claim heard under the federal statute regardless of what action or results might have been had in the state tribunal.

The District Court set aside the award by the deputy commissioner as "not in accordance with law"; the injunction was made permanent and the plaintiffs' motion for summary judgment was granted. In reaching that result, the Court said:

> "Since the claimant Drake here litigated to final judgment in a forum of his choice, a State District Court in Texas, and that Court deter-

mined that it had jurisdiction, such determination is res judicata and Drake made a binding election of remedies. He is, therefore, estopped from collaterally attacking such final judgment by filing a claim with Deputy Commissioner Calbeck."

It will be contended of course that this decision is distinguishable on the ground that the jurisdictional issue was expressly raised before the state tribunal. It is our position, as set forth rather fully in the first section of this reply brief, that jurisdiction is always an issue, whether specially pleaded or not, and that the award by the state tribunal was necessarily based on an implied finding that it had jurisdiction to make it. If our position is sound, as we believe it to be, then the same result should be reached in this matter as was reached in the *Texas* case.

CONCLUSION

For the foregoing reasons we believe that the decisions of the deputy commissioner and of the District Court were clearly erroneous and should be annulled.

Dated, San Francisco, California,
February 24, 1966.

Respectfully submitted,
HANNA & BROPHY,
By WARREN L. HANNA,
Attorneys for Appellants.